84-1941

NO.

Office-Supreme Court, U.S.
FILED
JUN 13 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM 1984

CALDER RACE COURSE, INC., TROPICAL PARK, INC., GULFSTREAM PARK RACING ASSOCIATION, INC., HIALEAH, INC., TAMPA BAY DOWNS, INC., AND TOURIST ATTRACTIONS, INC.,

Appellants,

VS.

DIVISION OF PARI-MUTUEL WAGERING, DEPARTMENT OF BUSINESS REGULATION, A STATE AGENCY, AND ROBERT ROSENBERG, DIRECTOR OF THE DIVISION OF PARI-MUTUEL WAGERING, AND RICHARD BURROUGHS, SECRETARY OF THE DEPARTMENT OF BUSINESS REGULATION,

Appellees,

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

JURISDICTIONAL STATEMENT

WILBUR E. BREWTON
& JAMES RILEY DAVIS
Taylor, Brion, Buker & Greene
225 S. Adams, Suite 250
Tallahassee, Florida 32301
(904) 222-7717

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTION PRESENTED

Whether the Florida statues prohibiting horse racing on Sunday in the State of Florida are invalid and unconstitutional in violation of the Fourteenth Amendment to the United States Constitution.

PARTIES IN COURT BELOW

All parties listed in the caption of the Title Page of the Jurisdictional Statement were parties in the case before the Florida Supreme Court, the Court from which this appeal is taken. However, the Florida Horse Council, Inc., whose name appears in the style of the case before the Florida Supreme Court, is not a party in this appeal because Florida Horse Council, Inc., was dismissed as a party by the Florida trial court (Dade County Circuit Court) because of lack of standing. The Florida Horse Council, Inc., is a corporation not for profit organized under the laws of the State of Florida and is an association which claims as membership all segments of the thoroughbred, standard bred and quarter horse industry in the state, including all of the other appellants in this appeal.

Robert M. Smith was listed as the Director of Pari-mutuel Wagering in the proceedings in the Florida courts and Gary Rutledge was listed as the Secretary of the Department of Business Regulation in the proceedings in the Florida courts. Robert Smith is no longer the Director of the Division of Pari-mutuel Wagering and Gary Rutledge is no longer Secretary of the Department of Business Regulation. Instead, Robert Rosenberg is now Director of the Division of Pari-mutuel Wagering and Richard Burroughs is the Secretary of the Department of Business Regulation; and their names have been substituted in the caption of the case before this court in lieu of Robert M. Smith and Gary Rutledge.

CORPORATE AFFILIATES

All of the corporations involved as parties in this

case are named as appellants in the caption. None of the named corporations have any subsidiaries or affiliates. Calder Race Course, Inc., is a summer thoroughbred race track permitted and licensed by the Division of Pari-mutuel Wagering (Division) to conduct summer thoroughbred racing in Dade County Florida; Gulfstream Park Racing Association, Inc., Hialeah, Inc., Tropical Park, Inc., and Tampa Bay Downs, Inc., are all winter thoroughbred horse race tracks authorized to conduct throroughbred racing in Broward, Dade or Hillsborough County, Florida. Tourist Attractions, Inc., is a licensed harness track authorized to conduct harness racing in Broward County, Florida.

TABLE OF CONTENTS

PAGE

OPINIONS BELOW 1
JURISIDICTION 2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 3
QUESTION IS SUBSTANTIAL 5
CONCLUSION 22
CERTIFICATE OF SERVICE 24
APPENDIX A - Mandate of Florida Supreme Court ..a-1

APPENDIX B - Decision of Dade County Circuit Court Order of Florida Third District .....a-2—a-5

Court of Appeal Certifying Case to Florida Supreme Court.....a-6

APPENDIX C - Final Decision of Florida Supreme Court .....a-7—a-13

Order of Florida Supreme Court Denying Petition For Rehearing a-14

APPENDIX D - Notice of Appeal to U.S. Supreme Court .....a-15—a-17

APPENDIX E - Copies of Relevant provisions of Chapter 550, Florida Statutes .....a-18—a-26

TABLE OF AUTHORITIES

PAGE

Braunfeld v. Brown,
81 S.Ct. 1141 (1961) 12

Eelbick Milling Co. v. Mayo,
86 So.2d 438 (Fla.) 18

Gallagher v. Crown Kosher Supermarket of Mass.,
81 S.Ct. 1121 (1961) 12

Hamilton v. State,
366 So.2d 8 (Fla.) 18

Henderson v. Antonacci,
62 So.2d 5 (Fla. 1952) 14, 15, 16, 18

Jay Burns Baking Co., v. Bryan,
264 U.S. 504, 44 S.Ct. 412 19

Kelly v. Backburn
95 So.2d 260 (Fla. 1957) 16

Louis K. Liggett Company v. Baldridge,
278 U.S. 105, 49 S.Ct. 57 18

McGowan v. State of Maryland
366 U.S. 420, 81 S.Ct. 1101,
6 L.Ed.2d 293 .....12, 13, 14

Moore v. Thompson,
126 So.2d 543 (Fla. S.Ct. 1961) 12, 16

Mutual Loan Company v. Martell,
222 U.S. 225, 32 S.Ct. 74 18

TABLE OF AUTHORITIES (continued)

PAGE

Nashville C.S.L. Railway v. Walters,
294 U.S. 405, 55 S.Ct. 486 18

State ex rel Furman v. Searcy,
225 So.2d 430 (Fla. 4th DCA 1969) 18

Two Guys From Harrison-Allentown v. McGinley,
81 S.Ct. 1144 (1961) 12

CONSTITUTION AND STATUTES

PAGE

F.S. 550 .....4, 7, 12, 20, 22

F.S. Sections 550.04, 550.065, 550.081, 550.291, 550.33(3), 550.37(4), 550.39, 550.41(3), 550.43 .....2, 3

F.S. 855, 855.01, 855.02, 855.04, 855.05, 855.06, 855.07 .....10, 11

Florida Constitution Art.X, Sec.7 .....7, 8

Florida Constitution Art.III Sec.23 8

Florida Constitution Art.IV, Sec.20 8

Florida Constitution Art.V, Sec.3(b)(5) 5

Florida Constitution Art.I, Sec. 2, 9 4

U.S.C. Sec. 1257(2) 2

United States Constitution
Fourteenth Amendment 4, 12, 22

MISCELLANEOUS

PAGE

Reference Vol26 Constitution F.S.A. 8

Chapter 5436 Sec. 1 General Statutes of Florida 1906 9

Chapter 3146 Section 1, 3 10

Chapter 1636 Act of August 6, 1968 10

Chapter 67-158 Laws of Florida Sec.1 11

Chapter 69-87 Laws of Florida Sec.1 11

Chapter 59-295 Laws of Florida 17

Revised Statutes of Florida 1892 Art. XII, Art. XV 10

McClellan's Digest Laws of Florida 1881 10

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984
NO. _____

Calder Race Course, Inc., Tropical Park, Inc., Gulfstream Park Racing Association, Inc., Hialeah, Inc., Tampa Bay Downs, Inc., and Tourist Attractions, Inc.,

Appellants,

vs.

Division of Pari-mutuel Wagering, Department of Business Regulation, a state agency, and Robert Rosenberg, Director of the Division of Pari-mutuel Wagering and Richard Burroughs, Secretary, of the Department of Business Regulation,

Appellees

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Dade County Circuit Court (the trial court below) is not reported (See Appendix B, infra., pages a-2—a-5). The opinion of the Florida Supreme Court is reported at 464 So.2d 128. (See Appendix C, infra., pages a-7—a-13).

JURISDICTION

The decision of the Florida Supreme Court declaring various Florida statutes, which prohibit horse racing in Florida on Sunday, constitutional, was decided by the court on January 24, 1985. Thereafter, appellants timely filed a Petition For Rehearing. The petition was denied on March 15, 1985. (Appendix C, infra., page a-14) The Notice of Appeal to this Court was filed in the Florida Supreme Court on May 31, 1985. (Appendix D, infra. p. a-15) The jurisdiction of this court is invoked under 28 U.S.C. §1257 (2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I
FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

II

SECTIONS 550.04, 550.065, 550.081,

550.291, 550.33(3), 550.37(4), 550.39, 550.41(3), 550.43, and 550.45, Florida Statutes, all prohibit horse racing on Sunday in the State of Florida by use of the words "No racing shall be permitted on Sunday" or "exclusive of Sundays", or "Sunday's excepted", or "except on Sunday." (The full text of these statutes appear in Appendix E, infra, pp. a-18—a-26)

III

ARTICLE X, SECTION 7
FLORIDA CONSTITUTION

"Lotteries. - Lotteries, other than the types of pari-mutuel pools authorized by law as of the effective date of this constitution, are hereby prohibited in this state."

STATEMENT OF THE CASE

1. This case involves the question of whether Sections 550.04, 55.065, 550.081, 550.291, 550.33(3), 550.37(4), 550.39, 550.41(3), 550.43 and 550.45, Florida Statutes, all contained within the pari-mutuel laws of the State of Florida and which prohibit horse racing on Sunday in the State of Florida, are unconstitutional under the Fourteenth Amendment to the United States Constitution by depriving the appellants of due process of law and equal protection of the law. Pari-mutuel wagering and horse racing was authorized by the legislature of the State of Florida in 1931 and the pari-mutuel laws of the State of Florida have always prohibited horse racing on Sunday in the State of Florida.

2. The attack on the constitutionality of the pari-

mutuel laws prohibiting horse racing on Sunday arose in the latter part of 1983 when Florida Horse Council, Inc. and the other named appellants to this proceeding filed a complaint for declaratory judgment and injunctive relief in the Circuit Court, Dade County, Florida challenging the validity of those Florida statutes hereinabove referenced prohibiting horse racing on Sunday in the State of Florida, on the grounds that same deprived the named parties of their right to due process and equal protection of the law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 2 and 9 of the Constitution of Florida, 1968. Thereafter, motions for summary judgment were filed by the parties and both the appellants and appellees agreed there were no genuine issues of material fact and consented to the trial court ruling on the constitutional issue

On July 26, 1984, the Circuit Court, Dade County, Florida issued its order granting final summary judgment in favor of the appellants in this cause, Calder Race Course, Inc., et al, and specifically ruled that those Florida statutes prohibiting pari-mutuel wagering on Sunday serve no valid secular purpose rationally related to a legitimate state objective and, as such, all were in violation of the United States and Florida constitution and as such were unconstitutional. The court ruled that the provisions of Chapter 550, Florida Statutes, which ban the conduct of pari-mutuel wagering on Sundays, were void and of no effect and the Division of Pari-Mutuel Wagering was specifically enjoined from enforcing them. (Appendix B, infra. pp. a-2—a-5)

Thereafter, the Division of Pari-Mutuel Wagering and the State of Florida appealed the Circuit Court decision

into the Florida Third District Court of Appeal, an intermediate appellate court. Upon agreement of the parties, the Third District Court of Appeal, without reaching a decision on the merits, certified to the Florida Supreme Court pursuant to Article V, Section 3(b) (5) of the Constitution of Florida, 1968 that the order of the trial court passed upon a question of great public importance requiring immediate resolution by the Florida Supreme Court. (Appendix B-a6) The Third District Court of Appeal certified the following question as being of great public importance:

> "Whether sporting activities involving pari-mutuel wagering may be prohibited on Sunday."

The Florida Supreme Court thereafter accepted jurisdiction and eventually rendered a decision dated January 24, 1985, reversing the decision of the trial court, answering the certified question in the affirmative, and declaring that the Florida statutes prohibiting horse racing on Sunday were constitutional. (Appendix C, pp. a-7—a-13) Thereafter, appellants timely filed a petition for rehearing and the petition for rehearing was denied by order dated March 15, 1985. (Appendix C, p. a-14) Appellants then filed their notice of appeal of the decision with the Clerk of the Florida Supreme Court on May 31, 1985. (Appendix D, infra., p. a-15)

THE QUESTION IS SUBSTANTIAL

In a decision dated January 24, 1985, The Supreme Court of Florida declared that the Florida statutes prohibiting horse racing on Sunday in the State of Florida were constitutional. It was the conclusion of the Florida Supreme Court that in order for the pari-mutuel statutes

involved to pass constitutional scrutiny, they must be able to be upheld as a valid exercise of the state's police power and must be rationally related to a legitimate state purpose. More specifically, the Florida Supreme Court stated that the Sunday closing laws which prohibit horse racing in Florida on Sunday must bear a rational relationship to the public health, safety, morals, or general welfare of the state's citizenry. (Appendix C, infra. pp. a-7—a-13)

The Florida Supreme Court thereafter opined that it would seem that the Florida legislature could have reasonably found that the Sunday racing and betting restrictions served several legitimate state purposes which promote the public health, safety, morals, and general welfare of the citizens of the State of Florida, even though there was no evidence of such state purposes in the record below and no intent was expressed in the statutory enactments. Nonetheless, the Florida Supreme Court stated that the prohibitions to horse racing on Sunday serve the following legitimate state purposes:

> "(1) They encourage people to spend their weekend leisure time at non-gambling, presumably more healthy recreational pursuits and other activities;
>
> (2) Closing such facilities on what might otherwise be the busiest day of the week could help curb the compulsive gambler syndrome;
>
> (3) Racing on less busy days means there is less opportunity for mischief that sometimes attends these events, and, therefore, a lighter burden on law enforcement authorities is created." (Appendix C, infra., p. a-10)

The Florida Supreme Court thereafter found that the statutues in question do serve legitimate state purposes. The aforereferenced state purposes were found by the Florida Supreme Court to be legitimate state purposes, even though the statutes in question in no way reveal such state purposes and even though there was no evidence in the record below to substantiate such findings, *and even though the pari-mutuel industry is the only industry in the State of Florida that is absolutely prohibited from conducting its business on Sunday.*

The Florida Supreme Court erred in concluding that the Florida statutes prohibiting horse racing on Sunday were constitutional. In light of the fact that the pari-mutuel industry is the only business in Florida that is absolutely prohibited from opening for business on Sunday, the issue of the constitutional validity of the aforementioned statutes is so substantial as to require plenary consideration with briefs and oral arguments for their resolutions.

As heretofore discussed, several statutory provisions within the current pari-mutuel law, Chapter 550, Florida Statutes, prohibit horse racing on Sunday.[1] The prohibitions against racing on Sunday have been in the laws authorizing pari-mutuel wagering since their inception in 1931.[2] Section 7 of Article X of the Florida

---

[1] E.G. 550.04 (thoroughbred) 550.33(3) (quarterhorse), 550.37(4) (harness) 550.41(3) (summer racing). These prohibitions are penal in nature since §550.07 allows the Division of Pari-mutuel Wagering to impose a fine or seek administrative penalties for violation of the provisions of Chapter 550; and §550.25 provides criminal penalties for the conduct of any unauthorized race meeting.

[2] See C.14832, Laws of Florida 1931, Vol. 1.

Constitution provides as follows:

> "Lotteries. -Lotteries, other than the types of pari-mutuel pools authorized by law as of the effective date of this constituion, are hereby prohibited in this state."

This constitutional provision specifically legitimizes pari-mutuel wagering in the state of Florida and sets forth the public policy of the State of Florida that pari-mutuel wagering is recognized as a legitimate business enterprise in the state of Florida regardless of the fact that pari-mutuel wagering is a form of gambling and regardless of any noxious qualities that might be deemed to exist in the eyes of some individuals or institutions.

The 1885 Florida Constitution was revised and amended in 1968. One of the provisions resulting from the amendment and revision was Article X, Section 7 as hereinabove referenced. Article X, Section 7 replaced Article III, Section 23, of the 1885 Constitution which stated that lotteries were prohibited in the State of Florida. Inconsistent with Article III, Section 23 of the 1885 Constitution was the provision also in that constitution which allowed the Florida legislature to regulate pari-mutuel pools.

The constitutional revision commission in 1968 recommended that all lotteries be prohibited except pari-mutuel pools regulated by law. The 1868 Constitution of Florida in Article IV, Section 20, included the same blanket prohibition against lotteries which existed under the 1885 Constitution. No prior Florida Constitution had such a provision. (Reference: Vol. 26 A., Constitution, F.S.A). The revision was ratified by the voters of the State of Florida

on November 5, 1968.

As such, in November 1968, the people of the State of Florida declared, as a matter of public policy, that pari-mutuel wagering was to be recognized as a legitimate form of business and endeavor in the State of Florida.

Pari-mutuel wagering has existed in the State of Florida for over fifty (50) years and, as such, is well established as a business enterprise in the State of Florida, as well as a form of entertainment and recreation, not only to the residents of the State of Florida, but to the many tourists attracted to the State of Florida by the pari-mutuel industry.

Prior to the enactment of the statutes authorizing pari-mutuel wagering in racing in 1931, the Florida legislature, in 1905, enacted a general prohibition against engaging in horse racing, as well as other games and sports on Sunday. Chapter 5436, Section 1, of General Statutes of the State of Florida 1906 (approved June 5, 1905), provided:

> "That whoever engages on Sunday in any game or sport, such as baseball, football, or bowling, as played in bowling alleys, *or horse racing*, whether as player, manager, director or otherwise, shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding $100.00 or by imprisonment in the county jail not exceeding three months, or by both such fine and imprisonment." (emphasis added)

This 1905 penal prohibition against engaging in

horse racing or other sports on Sunday was just one thread in a fabric of laws known as Sunday Closing Laws, Sabbath Laws, or Blue Laws[3] which pervaded the statutes of Florida and most of the states at that time. As early as 1832, the territory of Florida enacted laws which made criminal "offenses against religion, chastity, morality and decency."[4] These provisions prohibited disruption of divine worship or camp meetings, employment of apprentices, servants or slaves, conduct of other business, and sale of goods. Conducting a trade or business on Sunday in Florida was specifically prohibited in 1879 by enactment of Chapter 3146, Sec. 1,3.

In 1868, the Florida legislature enacted Chapter 1637, Act of August 6, 1968, which made a criminal offense of *inter alia*, peddling, gaming or horse racing near a camp (religious) meeting. See *McClellan's Digest of Laws of Florida*, 1881. This provision remained in the law well into the 1900's. These various provisions prohibiting activity on Sunday and protecting worship services from disruption were codified together in the *Revised Statutes of Florida in 1892*, Article XII, and Article XV.

By 1951, Florida's Sunday Laws, all penal provisions, were codified in Chapter 855, Florida Statutes. Section 855.01 prohibited following any pursuit, business or

---

[3] Called "Blue Laws" since 1781 when the Sunday Laws of New Haven, Connecticut, were printed on blue paper. *Sunday Closing Laws in the United States: An Unconstitutional Anachronism*, Vol. XI Suffolk University Law Review at 1089.

[4] Act February 10, 1832 Sec.62, 69, 70, Duval 124, 125, 126. These provisions re-enacted after Statehood in 1845 m are codified in Chapter VII, Crimes and Misdemeanors, Digest of Statute Law, State of Florida 1847.

trade on Sunday, with certain exceptions. Section 855.02 prohibited sale or barter of goods or wares on Sunday with certain exceptions. Section 855.04 prohibited use of firearms on Sunday. Section 855.04 prohibited in engaging in the sport of trap, target or skeet shooting on Sunday. Section 855.05 prohibited in engaging in sports, games or horse racing on Sunday. Section 855.07 specifically made it lawful to play ball and to operate certain industrial plants. These Florida statutory Sunday Laws were similar to the Sunday Laws in other states which began to come under challenge on a number of bases, including violation of the "establishment clause".[5]

In 1967, the Florida legislatures enacted Chapter 67-158, Section 1, Laws of Florida, which repealed Section 855.05 the prohibition against engaging in games or sports including horse racing, on Sunday. In 1969, the legislature enacted Chapter 69-87, Section 1, Laws of Florida, which repealed the remainder of Florida's Sunday Laws. *The only statutes remaining in Florida which prohibit the operation of a business on Sunday are contained in the pari-mutuel wagering laws as hereinabove referenced.*[6] As such, it is clear that Florida has a public policy of allowing businesses, no matter what the nature or purpose of the business, to operate and conduct its business and open its doors to the public whenever it elects. There no longer exists any

---

[5] First Amendment to the United States Constitution providing that "(congress) shall make no law respecting an establishment of religion..." made applicable to the states by the Fourteenth Amendment. Florida has its own "establishment clause" in Article I, Section 3 of the Constitution of Florida.

[6] Other than regulations relating to hunting and fishing which are clearly designed to preserve and protect wild life resources and are of more recent origin.

uniform day of rest policy in Florida to provide a basis for a legislative ban on Sunday horse racing. See also *Moore v. Thompson*, 126 So.2d 543 (Fla. S.Ct. 1961).

The Dade County Circuit Court found in a very well reasoned opinion that all parties to the proceedings and the court below agreed that the origin of the Sunday closing provisions, now incorporated in Chapter 550, Florida Statutes, date back to 1905; and that the statutes under attack which prohibit horse racing in Florida on Sunday were silent with respect to any legislative purpose, or intent behind mandating that the race tracks be closed on Sunday. The court further found and the parties agreed, that historically the purpose of such laws in Florida and elsewhere were to require observance of a religious Sabbath. Despite the religious origin of Sunday Closing Laws, several courts, including the United States Supreme Court, have upheld such laws against constitutional challenges if the statute served a valid secular purpose such as promoting a policy of a uniform day of rest for all citizens of the state. See: *McGowan v. State of Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed. 2d 393 (1961); *Gallagher v. Crown Kosher Supermarket of Mass.* 81 S.Ct. 1121 (1961); *Two Guys from Harrison-Allentown v. McGinley,* 81 S.Ct. 1135 (1961); *Braunfeld v. Brown* 81 S.Ct. 1141 (1961). When the United States Supreme Court has addressed the issue of the validity of a statute prohibiting a certain business from operating on a Sunday, even though other businesses were allowed to operate on Sunday, the court has upheld the validity of such statutes because it was able to discern a legitimate state purpose and a public policy of the state which promoted, for example, a uniform day of rest for all its citizens. In the cases decided by the U.S. Supreme Court, as referenced above, the fact that there

were exceptions to a business closing on Sunday was found not to automatically result in the statute being found to be in violation of the Fourteenth Amendment of the United States Constitution because there were generally valid reasons for having exceptions to Sunday closings. For example, the statutes in question, in the *McGowan* case, while prohibiting retail establishments, in general, from opening on Sunday, allowed drug stores to open on Sunday, allowed grocery stores to open on Sunday and also allowed certain establishments of a recreational nature to be opened on Sunday. In those instances, this court was able to find that the overall requirement that retail establishments be closed on Sunday promoted the public health, safety and welfare by promoting a uniform day of rest, relaxation and recreation; and that the retail establishments allowed to be open on Sunday as exceptions were of a "necessary" nature such as drug stores and grocery stores, or were of a recreational nature which further promoted that state objective of a uniform day of rest, relaxation and recreation.

Florida, on the other hand, clearly has no state objective or public policy promoting or advocating a uniform day of rest or relaxation for its citizens. To the contrary, Florida has a "open door" policy which advocates and promotes the premise that businesses should be allowed to conduct their business on any day of the week that they choose. This court, in *McGowan v. Maryland, supra,* recognized that Maryland's Sunday Closing Laws were enacted for the purpose of improvement of the health, safety, recreation and general well being of the state's citizens, and were enacted for the purpose and effect of providing a uniform day of rest for all citizens; and that, in effect, such objective would bear a reasonable and rational relationship to the public health, safety and welfare. The Florida

Supreme Court, in the decision being appealed to *this* Court, held that the mere fact that the State of Florida had no uniform day of rest for business would not preclude the legislature from enacting a day of rest and surcease from horseracing. The Florida Supreme Court went on to state that under *McGowan*, this Court did not require the existence of a pervasive scheme of Sunday closing in order to justify a Sunday closing law.

While this Court in *McGowan* may not have directly ruled that a state must have a pervasive scheme of Sunday closing in order to justify *any* closing requirement, *some* substantial real and reasonable statewide scheme justifying the closing in question must exist, even though such uniform scheme may result in practice in some inequality. The ban on Sunday horseracing in Florida does not in practice result in some inequality, but results in *total* inequality, as the pari-mutuel industry in the state of Florida is the only business prohibited from operating on Sunday.

In 1952, 1957 and 1961 the Florida Supreme Court took a different position consistent with appellant's position in the instant case. In 1952, in a suit brought by operators of used car lots, the Florida Supreme Court found that the Sunday closing laws as amended in 1951, were unconstitutional. In that decision, *Henderson v. Antonacci* 62 So.2d 5 (Fla. 1952), the Florida Supreme Court stated:

> "These Sections as amended cannot be upheld upon any religious principle, tenet or belief although it be founded upon the Biblical Admonition to 'Remember the Sabbath Day to keep it holy', because of our constitutional provisions requiring the complete separation of church and state...The constitutionality of these laws must be deter-

> mined upon a consideration of the query whether each or either was justified as an exercise of the police power which inheres in the state.
>
> * * *
>
> Laws similar to these have been upheld as a general rule not, as aforesaid, because of any right of the government to promote religious observances by legislative enactment, but only as an exercise of the police power in the protection of all citizens from the physical, as well as moral, degradation which might result from continuous labor."

In response to the defensive assertion that the Florida Sunday Closing laws did not deny equal protection because they operated equally on all members within the class of used car dealers, the Florida Supreme Court in *Henderson*, disagreed stating:

> "It may be said that the closing of all business houses on Sunday, except in cases of emergency, bears a rational and reasonable relationship to the general public health, safety, morals or general welfare because thereby protection is afforded all citizens from the evils attendant upon uninterrupted labor. Nevertheless, it does not follow that laws containing the exemption of many businesses and vocations such as the legislative enactments now under consideration, can be said to bear such relationship to the public health, safety, morals or general welfare as to declare them to be valid general laws (although they may be general laws in the sense that they are effective in each and every county of the state) simply because they operate equally upon all

> within a certain class or classes. *It is necessary that there be a valid and substantial reason to make such laws operate ONLY upon certain classes rather than generally upon all.*" (emphasis supplied)

Therefore, the Florida Supreme Court ruled in *Henderson* that where numerous classes of businesses are allowed to remain open on Sunday, there must be a "valid and substantial" reason why only certain classes of business are required to close. Thus, the Florida Supreme Court concluded that a law requiring used car dealers to close on Sunday, while numerous other business and tourist attractions were allowed to operate *failed to bear a reasonable relationship to accomplishing any objective within the police power of the state.* The Florida Supreme Court explained:

> "We can think of no reason, and none as been suggested to us, why the health, safety, morals and general welfare of our citizens would be safeguarded to any greater degree by requiring used car dealers to close their places of business on Sunday, than such rights or guaranties (sic) would be safeguarded were such persons allowed to do business on the Sabbath along with proprietors of tourist attractions."

In 1957, in the case of *Kelly v. Blackburn,* 95 So.2d 260 (Fla 1957), the Florida Supreme Court again struck §855.01 and 855.02, as amended in 1955, for the same infirmities present in the 1951 law, even though the legislature had reduced the number of exemptions to the law.

The Florida Supreme Court, in *Moore v. Thompson,*

126 So.2d 543 was again called upon in 1961 to determine the constitutionality of Chapter 59-295, Laws of Florida. The legislature, in an effort to again prohibit the sale of automobiles on Sunday, set forth in the Preamble of Chapter 59-295, no less than eight (8) asserted puposes justifying the act. The Florida Supreme Court concluded, nonetheless, that the "valid and substantial reason" yardstick had not been met which would allow the legislature to make the Sunday closing law operate on *less than generally all businesses* and thereafter found Chapter 59-295, Laws of Florida unconstitutional. In so doing, the court noted the decisions of other states upholding similar laws based on the policy of those states to close businesses on Sunday. The Florida Supreme Court stated:

> "(Such [uniform day of rest] we have pointed out, is *not* the public policy of this state.") Id. at 552.

Appellants are unaware of any case decided by this court determining the validity of a statute which prohibited a business from operating on Sunday, where no other business in the State was so prohibited. This presents a substantial question to this court which will require plenary consideration with briefs and oral argument, for their resolution.

All parties agreed, and the Florida Supreme Court so ruled, that if the statutes prohibiting horse racing on Sunday were to be upheld and pass constitutional scrutiny, they must be upheld as a valid exercise of the state's police power. Legislative action exercised under the police power is valid only if its exercise is confined to those acts that may be *reasonably* construed as expedient for the protection of the public health, safety, welfare, or morals.

Hamilton v. State, 366 So.2d 8 (Fla.); *Louis K. Liggett Company v. Baldridge,* 278 U.S. 105, 49 S.Ct. 57. Further, the fixed rule and basic standard by which the validity of all police power is tested is that the police power extends only to such measures as are reasonable and that all police regulations must be reasonable under all circumstances. *Nashville C.S.L. Railway v. Walters,* 294 U.S. 405, 55 S.Ct. 486; *Eelbick Milling Co. v. Mayo,* 86 So.2d 438 (Fla.). In effect, an unreasonable or unnecessary exercise of police power in a manner or to an extent by which private, personal or property rights are curtailed or impaired, violates the due process clause of the State and Federal constitutions. *State ex rel Furman v. Searcy,* 225 So.2d 430 (Fla. 4th DCA 1969). Thus, the validity of any police regulation primarily depends on whether under all existing circumstances, the regulation is reasonable or arbitrary, and whether it is really designed to accomplish a purpose properly falling within the scope of the police power. *Mutual Loan Company v. Martell,* 222 U.S. 225, 32 S.Ct. 74. For a police power measure to be reasonable, it should be reasonably related to the public health, safety, or welfare and may be exerted in the form of state legislation, only where the legislation bears a *real* and *substantial* relation to the public health, safety, and morals, or some other phase of the general welfare. *Louis K. Ligget Co. v. Baldridge, supra; Henderson v. Antonacci,* 62 So.2d 5 (Fla. S.Ct. 1952). Thus, a reasonable regulation under the police power implies that the regulatory objective is the welfare of the general public rather than that of a special class or segment, that the regulation is not arbitrary but rests on "adequate reason", and that where the regulation's general objective is within the state's regulatory power, the individual provisions have a "real and substantial relation" to that objective. A statute or ordinance which has no

real, substantial or rational relation to the public safety, health, morals, or general welfare, is a papable invasion of rights secured by the fundamental law and cannot be sustained as a legitimate exercise of the police power. *Jay Burns Baking Co. v. Bryan,* 264 U.S. 504, 44 S.Ct. 412.

While the legislature, in the use of police power, is obviously the initial judge, within reasonable limits, of what the public welfare requires, the court's function in examining the constitutional aspects of police power legislation is to decide whether the purpose of the legislation is a legitimate one and whether the particular enactment is designed to accomplish that purpose in a fair and reasonable way. An absolute ban on Sunday horseracing is arbitrary and capricious, unreasonable and irrational and cannot be said to be rationally related to the public health, safety and welfare for the following reasons:

> 1. The primary reason the state is interested in horse racing and has authorized horse racing in the state of Florida is state tax revenue and the record indicates, and the state so concedes, that more revenue will be produced for the state if Sunday racing is authorized;
>
> 2. The health, safety, welfare and morals of the people of the State of Florida are just as protected on Monday, Tuesday or Wednesday of the week as they are on Sunday. Horse racing is authorized and has been legitimatized under the constitution of the State of Florida. The public health, safety, welfare and morals are not any more protected or promoted on Sunday than any other day of the week;

3. The *number of days* that a horserace track may operate during a racing season is governed by statute. See Chapter 550, Florida Statutes. Competition and practicality, as well as the Division of Pari-mutuel Wagering's discretion in allocating racing dates under Chapter 550, F.S., will achieve any valid state objective that may exist advocating less than seven (7) days of racing per week;

4. The primary state objectives in regulating pari-mutuels are as follows:

(a) Protecting the citizens of the State from corruption, cheating and deceit;
(b) Making sure that the betting public is treated fairly by the pari-mutuel interest;
(c) Preserving and protecting the revenue to be derived by the state from pari-mutuel wagering; and to insure that the citizens of the state are obtaining their fair share of the wagers placed;
(d) Promoting the sport of racing while protecting the integrity of the sport;
(e) Preserving the integrity of racing from corruption;
(f) Keeping the betting public from being misled;
(g) Reduce the risk of injury to animals used in racing or to humans involved in the sport;
(h) Protect animals from cruel and inhumane treatment.

All of these objectives can be obtained on any day of

the week. To contend that an absolute ban of horseracing on Sunday somehow rationally and reasonably preserves or protects the public welfare, health, safety and morals is incredulous and totally without foundation, irrational and unreasonable. The absolute ban on Sunday horseracing has absolutely nothing to do with the public welfare, safety, health and morals, and as such, is an unreasonable means of accomplishing the legitimate state objective of regulating the pari-mutuel industry. As stated by the Dade County Circuit Court:

> "Likewise, there is no question that in theory, the legislature if it so chose, could require the plaintiffs to close one day or two days per week to rest the horses or other articulated reasons which could benefit the industry or the public. However, this theoretical power bears no rational relation to requiring the tracks to close on any particular day, especially Sunday. Whatever legislatively perceived benefits the industry or the public may derive from closing pari-mutuel facilities one or two days per week will be just as easily obtained from closing on Monday or a Tuesday rather than on a Sunday."

When it is taken into consideration that the pari-mutuel industry is the only industry in Florida absolutely prohibited from conducting its business on Sunday; when it is further considered that Florida has no public policy advocating a uniform day of rest and relaxation; when it is further considered that Florida instead advocates an "open door" policy for businesses in the State; when it is further considered that pari-mutuel wagering in Florida has existed for over fifty (50) years, and has been legitimatized

and authorized under the Florida Constitution and that pari-mutuel wagering is itself a form of entertainment and recreation, no legitimate state objective can exist justifying the absolute ban of horse racing on Sunday. An absolute ban to horse racing on Sunday is clearly arbitrary and capricious and does not bear any rational relationship to the protection of the public health, safety, welfare and morals of the citizens of the state of Florida; and as such, cannot be upheld as a legitimate exercise of the state police power. Appellants can think of no reason, and none has really been suggested by the Appellees, why the health, safety, morals or general welfare of the state's citizens would be safeguarded to any greater degree on Sunday than any other day of the week. Moreover, it is quite obvious that the Florida legislature, in the enactment of the very stringent regulations contained in Chapter 550, Florida Statutes, has adequately and thoroughly protected the public.

Accordingly, it is suggested that a substantial question has been submitted to this court for determination under the Fourteenth Amendment to the United States Constitution.

CONCLUSION

The pari-mutuel industry is the only industry in the state of Florida absolutely prohibited by state law from conducting its business on Sunday. It is respectfully suggested that the question presented under the Fourteenth Amendment to the United States Constitution is so substantial as to require plenary consideration, with briefs on the merits and oral argument for their resolution.

Jurisdiction should be noted.

Respectfully submitted

WILBUR E. BREWTON
and

JAMES RILEY DAVIS

Taylor, Brion, Buker & Greene
225 S. Adams, Suite 250
Tallahassee, Florida 32301
(904) 222-7717

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Statement was served by U.S. mail this 12th day of June, 1985, on Jim Smith, Attorney General of the State of Florida, Department of Legal Affairs, Office of the Attorney General, The Capitol, Tallahassee, Florida, 32304; Louis Hubener, Assistant Attorney General, Department of Legal Affairs, Office of the Attorney General, The Capitol, Tallahassee, Florida 32304; and Harry F. X. Purnell, General Counsel, Department of Business Regulation, The Johns Building, 727 S. Bronough Street, Tallahassee, Florida 32301.

WILBUR E. BREWTON

APPENDIX A
MANDATE SUPREME COURT OF FLORIDA

To the Honorable, the Judges of the Circuit Court in and for Dade County, Florida

WHEREAS, in that certain cause filed in this Court styled:

DIVISION OF PARI-MUTUEL WAGERING, DEPARTMENT OF BUSINESS REGULATION, A STATE AGENCY, and ROBERT M. SMITH, DIRECTOR OF THE DIVISION OF PARI-MUTUEL WAGERING, AND GARY RUTLEDGE, SECRETARY OF THE DEPARTMENT OF BUSINESS REGULATION v. FLORIDA HORSE COUNCIL, INC., CALDER RACE COURSE, INC., TROPICAL PARK, INC., GULFSTREAM PARK RACING ASSOCIATION, INC., HIALEAH, INC., TAMPA BAY DOWNS, INC., and TOURIST ATTRACTIONS, INC.

Case No. 65,820

Your Case No.
83-43878 (09)

The attached opinion was rendered on January 24, 1985

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.

WITNESS the Honorable Joseph A. Boyd, Jr.
Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital, on this 15th day of March, 1985

Clerk of the Supreme Court of Florida

APPENDIX B

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY,
FLORIDA

CASE NO. 83-43878 (09)

FLORIDA HORSE COUNCIL INC., et al., Plaintiffs	)	
vs.	)	ORDER GRANTING
DIVISION OF PARI-MUTUEL WAGERING, DEPARTMENT BUSINESS REGULATION, etc., et al., Defendants.	)	FINAL SUMMARY JUDGEMENT

This cause came before the Court on a Joint Motion for Summary Judgment. The parties have stipulated that no genuine issue of material fact exists and that trial of this cause would not produce any variance in the material facts already presented to the Court. Therefore upon consideration of the record before the Court, the memoranda submitted by the parties and argument of counsel, the Court makes the following findings:

1. Chapter 550 of the Florida Statutes is entitled "Dogracing and Horseracing" and provides the regulatory background for conducting racing and pari-mutuel wagering in these industries. Certain provisions of Chapter 550 prohibit horsetracks from conducting pari-mutuel wagering on Sundays.

2. The Florida Horse Council and its member tracks attack the constitutionality of those statutues containing

this Sunday prohibition. The Florida Horse Council has been previously dismissed from this lawsuit as lacking standing to challenge these statutes, however the action has continued on behalf of the individual plaintiffs who are racetrack permitholders. The defendant, the Division of Pari-Mutuel Wagering, is authorized and required to enforce the provisions of Chapter 550.

3. All Parties agree that the origin of the Sunday closing provisions, now incorporated in Chapter 550, date back to 1905. The statutes in question are silent with respect to any legislative purpose or intent behind mandating Sunday closing, however, historically, the purpose of such laws in Florida and elsewhere was to require observance of a religious Sabbath. Yet despite the religious origin of these Sunday closing laws several courts, including the United States Supreme Court, have upheld them against constitutional challenges if the statute served a valid secular purpose such as promoting a policy of a uniform day of rest for all citizens of a state. *See; McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed. 2d 393 (1961)

4. The Florida Supreme Court has held that the State of Florida does not have a policy of providing a uniform day of rest for its citizens. Furthermore it appears that over the years Florida's original Sunday closing laws or "blue laws" have all been either repealed or declared unconstitutional so that only the Sunday closing of pari-mutuel facilities remains. The Florida Supreme Court has further held that the state must demonstrate a valid and substantial reason for a Sunday closing law to operate on only one class of business rather than on all classes. Thus for the instant Sunday closing law to be upheld it must serve a valid

secular purpose which is rationally related to the requirement of closing pari-mutuel facilities on Sunday. *See; Henderson v. Antonnacci,* 62 So.2d 5 (Fla. 1952); and *Moore v. Thompson,* 126 So.2d 543 (Fla. 1961).

5. The record establishes that Sunday racing will not injure the state in any manner with respect to increased regulatory or administrative cost. In fact, the record indicates the state stands to benefit financially if pari-mutuel wagering is conducted on Sunday. Furthermore, it is undisputed that all the Plaintiffs wish to conduct business on Sunday and would do so but for the statutory prohibition.

6. The defendant has advanced, basically, two reasons which it contends allow the legislature to treat the pari-mutuel industry differently from other businesses thus authorizing the Sunday closing requirements. They are: 1) the allegedly "noxious" characteristics of the racing industry such as gambling and the possibility of race fixing, horse drugging and the like; and, 2) the uncontested power of the state to limit the number of days on which racing occurs.

7. Both sides agree that the state may, because of the nature of racing which includes legalized gambling, legally impose heavier regulations on this particular industry than on others. However the question this Court must answer is whether, given this power, the Sunday closing requirement is rationally related to any valid secular objective.

8. With respect to defendant's contentions that the noxious characteristics of racing authorize Sunday closing, both the record and common sense unequivocally indicate that, whatever these noxious characteristics may be, they

are no more likely to occur on Sunday than on any other day of the week.

10. Likewise, there is no question that, in theory, the legislature, if it so chose, could require the plaintiffs to close one day or two days per week to rest the horses or for other articulated reasons which would benefit the industry or the public. However, this theoretical power bears no rational relation to requiring the tracks to close on any particular day, especially Sunday. Whatever legislatively perceived benefits the industry or the public may derive from closing pari-mutuel facilities one or two days per week will be just as easily obtained from closing on a Monday or a Tuesday rather than on Sunday.

Therefore, it is the conclusion of this Court that those statutes prohibiting the conduct of pari-mutuel wagering on Sunday serve no valid secular purpose rationally related to a legitimate state objective; that they are in violation of the United States and Florida Constitutions and are therefore declared unconstitutional. The plaintiffs' motion for summary judgment is granted. Those provisions of Chapter 550 which ban the conduct of pari-mutuel wagering on Sundays are declared void and of no effect and the defendant is enjoined from enforcing them.

Done and ordered in Chambers in Miami, Florida, this 26th day of July, 1984.

/s/ David L. Levy
CIRCUIT COURT JUDGE

Copies furnished to:
James C. Pilkey, Esquire
Wilbur E. Brewton, Esquire
Louis F. Hubener, Esquire

IN THE DISTRICT COURT OF APPEAL OF FLORIDA THIRD DISTRICT JULY TERM, A.D. 1984

DIVISION OF PARI-MUTUEL WAGERING, DEPARTMENT OF BUSINESS REGULATION, etc., et al.,
Appellants,
vs.
FLORIDA HORSE COUNCIL, INC., et al.,
Appellees.

CASE NO. 84-1871

To the Honorable, The Supreme Court of Florida:

We hereby certify to the Supreme Court of Florida that the judgment of the trial court in this cause requires immediate resolution by the Supreme Court of Florida because the issue pending herein is of great public importance, to wit, whether sporting activities involving parimutuel wagering may be prohibited on Sunday.

A True Copy
ATTEST:

Clerk District Court of Appeal,
Third District

Respectfully submitted,

/s/ Alan R. Schwartz
Chief Judge

/s/ Daniel S. Pearson
Judge

Wilbur E. Brewton
Louis F. Hubener
Jim Smith
David Maloney
Department of Business Regulation

/s/ James R. Jorgenson
Judge

APPENDIX C

Supreme Court of Florida

No. 65,820

[January 24, 1985]

DIVISION OF PARI-MUTUEL WAGERING
DEPARTMENT OF BUSINESS REGULATION
A STATE AGENCY, and ROBERT M. SMITH,
DIRECTOR OF THE DIVISION OF
PARI-MUTUEL WAGERING, AND GARY RUTLEDGE,
SECRETARY OF THE DEPARTMENT OF BUSINESS
REGULATION, Appellants,

v.

FLORIDA HORSE COUNCIL, INC.,
CALDER RACE COURSE, INC.,
TROPICAL PARK, INC., GULFSTREAM
PARK RACING ASSOCIATION, INC.,
HIALEAH, INC., TAMPA BAY DOWNS, INC.,
and TOURIST ATTRACTIONS, INC., Appellees.

ADKINS J.

This cause is before the Court on appeal from judgment entered by the Circuit Court of the Eleventh Judicial Circuit, sitting in Dade County. An appeal of the judgment was taken to the Third District Court of Appeal and that court has certified the case as requiring immediate resolution and has certified the following question as being of great public importance:

Whether sporting activities involving pari-mutuel wagering may be prohibited on Sunday.

We have jurisdiction pursuant to article V, section 3(b) (5), Florida Constitution. We find that sporting activities involving pari-mutuel wagering may be prohibited on Sunday and, therefore, answer the certified question in the affirmative.

Appellees, race track permit holder who conduct horseracing at various tracks in Florida, filed their complaint in this action in the circuit court, Dade County, Florida, in December, 1983. They sought to have declared unconstitutional those provisions in chapter 550, Florida Statutes (1981), which prohibit horseracing and pari-mutuel gambling on Sunday.

On July 26, 1984, the circuit court entered a summary judgment in favor of appellees ruling that the provisions of chapter 550 that ban the conduct of pari-mutuel wagering on Sundays were unconstitutional.

Appellants timely filed a notice of appeal. The Third District Court of Appeal certified the case to be of great public importance and to require immediate resolution by this Court. We accepted jurisdiction of the case on September 10, 1984.

A study of the early American Sunday closing laws will reveal that they originated from and were founded upon religious principles and beliefs. The original purpose of these laws was to protect the Christian Sabbath pursuant to the Biblical command to "Remember the Sabbath Day to Keep it Holy." Exodus 31:14.

In *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948), and *Everson v. Board of Education*, 330 U.S. 1 (1946), the United States Supreme Court held that the fourteenth amendment protected the individual against any state statute which infringed upon his individual convictions or beliefs. Thus, it was inevitable that Sunday closing legislation in our country would be subject to constitutional attack.

A further examination of the judicial history of these laws in that state of Florida will reveal that they will not be upheld upon any religious principle, tenet, belief or admonition because of our constitutional provisions requiring the complete separation of church and state. Art. I, §3, Fla. Const.; *Henderson v. Antonacci*, 62 So.2d 5 (Fla. 1952). Case law dictates that if such laws are to pass constitutional scrutiny, they must be upheld as a valid exercise of the state's police power and must be rationally related to a legitimate state purpose. 62 So.2d at 8. More specifically, the Sunday closing laws must bear a rational relationship to the public health, safety, morals, or general welfare of our citizenry. *Id.*

Appellant contends that the laws prohibiting Sunday sporting activities involving pari-mutuel wagering are rationally related to a legitimate state purpose and are therefore constitutionally sound. We agree.

The Court long ago recognized the intrinsically problematic character of gambling and horse racing and the state's right to strictly control it.

> Authorized gambling is a matter over which the state may exercise its police power

> in a more arbitrary manner because of the noxious qualities of the enterprise as distinguished from those enterprises not affected with a public interest and those enterprises over which the exercise of the police power is not so essential for the public welfare.

Hialeah Race Course, Inc. v. Gulf Stream Park Racing Association, 37 So.2d 692 (Fla. 1948), *appeal dismissed*, 336 U.S. 948 (1949). This language was reiterated a year later in *Rodriguez v. Jones*, 64 So.2d 278 (Fla. 1953). In both *Hialeah* and *Rodriguez* the Court noted that gambling is inherently dangerous to society and for that reason may be lawfully prohibited. In 1978, this Court recognized once again that it is within the police power of the state to enact laws to suppress gambling. *Schultz v. State*, 361 So.2d 416 (Fla. 1978). Thus, it is well established that the legislature has broad discretion in regulating and controlling parimutuel wagering and gambling under its police powers. In the instant case, it would seem that the legislature could reasonably find that the Sunday racing and betting restrictions serve several legitimate state purposes which promote the public health, safety, morals, and general welfare of the citizens of the state of Florida. The restrictions serve these legitimate purposes: 1) they encourage people to spend their weekend leisure time at non-gambling, presumably more healthy recreational pursuits and other activities; 2) closing such facilities on what might otherwise be the busiest day of the week could help curb the compulsive gambler syndrome; and 3) racing on less busy days means there is less opportunity for mischief that sometimes attends these events, and therefore a lighter burden on law enforcment authorities is created. Thus, we find that the statutes in question do serve legitimate state purposes.

In *McGowan v. Maryland*, 366 U.S. 420 (1961), the United States Supreme Court ruled that not only do states have the power to enact laws setting aside a uniform day of rest, but also they have the power and authority to fix the day, and that day may be Sunday. The mere fact that the state of Florida has no uniform day of rest for other businesses does not preclude the legislature from having a day of rest and surcease from racing and pari-mutuel wagering. In *McGowan*, the Maryland law under review required numerous businesses to close on Sunday but also provided many exceptions to the law. As to the argument that this constituted unlawful discrimination, the Court stated:

> [T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

366 U.S. at 425-26 (citations and footnote omitted). The Supreme Court did not require the existence of a pervasive scheme of Sunday closing in order to justify any closing requirement. Rather, the test is whether the law "is wholly irrelevant to the achievement of the state's objective. *Id.* Moreover, this Court has held that classifications under the police power will not be judicially annulled unless wholly without a rational basis. *Hamilton v. State*, 366 So.2d 8 (Fla. 1978).

In *Rodriguez v. Jones*, 64 So.2d 278 (Fla. 1953), this Court found that treating jai alai frontons as a distinct class was appropriate because the restriction at issue applied equally to all frontons "similarly circumstanced." Chapters 550 and 551, Florida Statutes, uniformly require all sporting activities involving pari-mutuel gambling to cease operation on Sunday. Those activities include thoroughbred racing, harness racing, quarterhorse racing, dog racing and jai alai. Under the statutes in question, all pari-mutuel facilities appear to be "similarly circumstanced." The record in the instant case is barren of any indication to the contrary.

Thus, we find that the closing requirement in question does not constitute unlawful discrimination and is therefore rationally related to the aforementioned legitimate state purposes. The legislature has the discretion to designate a day of surcease from sporting activities involving pari-mutuel wagering and to specify the day, and that day may be Sunday.

Accordingly, the decision of the trial court is reversed.

It is so ordered.

BOYD, C.J., OVERTON, ALDERMAN, McDONALD, EHRLICH and SHAW, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Direct Appeal of Judgment of Trial Court, in and for Dade County, David L. Levy, Case No. 83-43878 (09) - Certified by the District Court of Appeal, Third District, Case No. 84-1871

Jim Smith, Attorney General; Louis F. Hubener, Assistant Attorney General and Mitchell D. Franks, Chief Trial Counsel, Tallahassee, Florida,

for Appellants

Wilbur E. Brewton and J. Riley Davis of Taylor, Brion, Buker and Greene, Tallahassee, Florida,

for Appellees

IN THE SUPREME COURT OF FLORIDA
FRIDAY, MARCH 15, 1985

DIVISION OF PARI-MUTUEL WAGERING, DEPARTMENT OF BUSINESS REGULATION, A STATE AGENCY, and ROBERT M. SMITH, DIRECTOR OF THE DIVISION OF PARI-MUTUEL WAGERING, AND GARY RUTLEDGE, SECRETARY OF THE DEPARTMENT OF BUSINESS REGULATION, Appellants	**	CASE NO. 65,820 District Court of Appeal 3d District No. 84-1871
vs.	**	Circuit Court Case No.
FLORIDA HORSE COUNCIL, INC., CALDER RACE COURSE, INC., TROPICAL PARK, INC., GULFSTREAM PARK RACING ASSOCIATION, INC., HIALEAH, INC., TAMPA BAY DOWNS, INC., and TOURIST ATTRACTIONS, INC., Appellees.	**	83-43878 (09) (Dade County)

On consideration of the petition for rehearing filed by attorneys for appellees, and response thereto,

IT IS ORDERED by the Court that said petition be and the same is hereby denied.

A True Copy
TEST:

Sid J. White
Clerk Supreme Court

C
cc: Hon. Richard P. Brinker, Clerk
Hon. David L. Levy, Judge
Hon. Louis J. Spalone, Clerk

Wilbur E. Brewton, Esquire
and J. Riely Davis, Esquire
Louis F. Hubener, Esquire
David Maloney, Esquire

APPENDIX D
IN THE SUPREME COURT OF THE STATE OF FLORIDA

Division of Pari-mutuel Wagering,
Department of Business Regulation,
a State Agency, and Robert M. Smith,
Director of the Division of Pari-mutuel
Wagering, and Gary Rutledge, Secretary
of the Department of Business Regulation,
Appellants,

vs. CASE NO. 65,820

Florida Horse Council, Inc., Calder
Race Course, Inc., Tropical Park, Inc.,
Gulfstream Park Racing Association, Inc.,
Hialeah, Inc., Tampa Bay Downs, Inc., and
Tourist Attractions, Inc.,
Appellees.

NOTICE OF APPEAL
TO THE
SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Calder Race Course, Inc., Tropical Park, Inc., Gulfstream Park Racing Association, Inc., Hialeah, Inc., Tampa Bay Downs, Inc., and Tourist Attractions, Inc., all of the Appellees above named except the Florida Horse Council, Inc., which was dismissed as a proper party in the trial court, because of lack of standing, hereby appeal to the Supreme Court of the United States from the final judgment of the Florida Supreme Court reversing the decision of the Dade County Circuit Court, State of Florida, by upholding the constitu-

tionality of the Florida statutes which prohibit horse racing on Sunday. The decision of the Florida Supreme Court was entered on March 15, 1985.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

By _____
WILBUR E. BREWTON

By _____
J. RILEY DAVIS
Taylor, Brion, Buker
& Greene
225 S. Adams Street, #250
Tallahassee, Florida 32301
(904) 222-7717

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Appeal was served by U.S. mail this 31st day of May, 1985, on Jim Smith, Attorney General of the State of Florida, Department of Legal Affairs, Office of the Attorney General, the Capitol, Tallahassee, Florida 32304, Louis F. Hubener, Assistant Attorney General, Department of Legal Affairs, Office of the Attorney General, the Capitol, Tallahassee, Florida 32304, Harry F. X. Purnell, General Counsel, Department of Business Regulation, The Johns Building, 725 S. Bronough Street, Tallahassee, Florida 32301.

By _____

WILBUR E. BREWTON

APPENDIX E

550.04 Racing meetings authorized; restriction.— Any person desiring to operate a racetrack in this state may, subject to the provisions of this chapter, hold and conduct one or more racing meetings at such track each year. Horse racetrack meetings shall be held only from and including the period extending from December 1 of each year to and including April 20 of the year following, which period shall be known as the horseracing season, and the dog racetrack meetings shall be held only during the period extending from and including November 1 of each year to and including May 31 of the year following, which period shall be known as winter dogracing season; provided, however, that summer dog track meetings shall be held only during the period beginning with and including June 1 and up to and including September 30, in counties lying wholly east of the St. Johns River, south of an east-west line from the Matanzas Inlet to said river, and north of latitude 28 degrees 35 minutes; and provided further that both horserace meetings and dograce meetings shall be limited to the aggregate number of racing days as provided in s.550.08. No racing shall be permitted on Sunday, and no minors except jockey apprentices, exercise boys, and grooms shall be permitted to attend said races or to be employed in any manner by the track provided, however, nothing in this chapter shall be construed to prohibit the use of any dogracing plant or facility for the conducting of "hound dog derbies" or "mutt derbies" from being used on one Sunday during each racing season by any charitable, civic, or nonprofit organization for the purpose of conducting "hound dog derbies" or "mutt derbies" where only dogs other than those usually used in dogracing (greyhounds) are permitted to race and where adults and

minors may participate as dog owners or spectators, and provided further that during such racing events betting and gambling and the sale or use of alcoholic beverages shall be strictly and absolutely prohibited.

History.—s. 4, ch. 14832, 1931; s. 4, ch. 17276, 1935; CGL 1936 Supp. 4151(52); ss. 1, 3, ch. 21636, 1943; ss. 2, 3, ch. 22072, 1943; s. 1 ch. 22599, 1945, s. 1 ch. 24360, s. 1, ch. 24362, 1947; s. 2, ch. 57-180; s. 9, ch. 59-406. cf.—s. 1.01 "Minor" defined.

550.065 Harness racing; certain permits validated; license.—

(2) Any horseracing track, in harness with sulky, which may be established and shall operate by virtue of the provision of subsection (1) shall be entitled to a license from the division for a meet or meetings for a period of not exceeding 90 days of racing during the established racing season, fixed by law, for horseracing, and during such meet or meeting racing may be conducted by a valid permittee at such track either in the daytime or nighttime, at the option of the permitholder, or at the election of the permitholder, the racing season may be divided so that part of the racing during any one season may be conducted at nights and part in the daytime; provided, however, there shall be no racing on Sunday, and when racing is being conducted at nights, there shall be no racing in the daytime of the same day.

550.081 Allocation of horseracing periods of operation.—

(1) When there are three or more winter thoroughbred horse racing permitholders located within a 35-mile radius of each other, an annual winter thoroughbred racing season consisting of 150 racing days, exclusive of Sundays, is authorized. Each winter permitholder is authorized to operate in only one of the three

periods of racing hereinafter set out, and all racing days shall be run consecutively. Each racing period is established as follows:

550.291 Racing and jai alai, periods of operation; limitation.—

(1) The Florida Pari-mutuel Commission may annually allocate to the owners of valid outstanding permits under and by virtue of which greyhound racing is now conducted in this state, not less than 90 days of racing, and not more than the number of racing days allocated or permitted to jai alai permittees, plus scholarship days and charity days allowed by law, Sundays excepted and excluded. Provided, however, the commission shall not allocate, for any one greyhound or jai alai permittee, less than 90 days or more than 105 days of racing, plus scholarship days and charity days, Sundays excepted and excluded.

(2) The provisions of this section are supplemental to other provisions of this chapter.

History.—ss. 1, 2, ch. 65-435; s. 1, ch. 71-98; s. 16, ch. 79-4; s. 5, ch. 84-96.

550.33 Quarter horse racing: substitutions.—

(3) Any quarter horse racing permitholder is authorized to conduct quarter horse races throughout the year, except on Sundays. Such races may be continuous or portioned at various periods of time, not to exceed 120 days annually. These races may be performed only at any one or more licensed tracks and may be conducted by day or night or part by day and part by night. The operator of any licensed racetrack is authorized to lease such track to any quarter horse racing permitholder for the conduct of quarterhorse racing under this chapter. The permitholder

conducting a quarter horse race meet shall pay the daily license fee, the admission tax, the tax on breaks, and the tax on pari-mutuel handle provided in s. 550.09 and shall be subject to all penalties and sanctions provided in s. 550.08(6).

550.37 Operation of certain harness tracks.—

(4) No permit shall by issued by the Division of Pari-mutuel Wagering for the operation of a harness track within 75 air miles of a location of a harness track licensed and operating under the provisions of this chapter. All harness tracks licensed under the provisions of this chapter shall be granted by the Florida Pari-mutuel Commission racing dates during the winter horseracing season as provided by s. 550.291, which racing dates may commence on or after October 1 of each year and shall conclude on or before June 1 of each year, and such permittee and licensee shall be permitted and authorized to race every day except Sunday. However, no more than 120 days, plus scholarship and charity days, may be allocated in the period between October 1 of any year and June 1 of the succeeding year.

550.39 Summer horseracing authorized for certain harness tracks.—

(1) Any permitholder authorized by s. 550.068 to conduct horseracing in harness at any track west of the St. Johns River shall be permitted during the summer racing season, as hereinafter defined and set forth, to conduct at permittee's option and at its location up to 90 days of horseracing in harness, quarter horse or thoroughbred racing in any county of the state where no thoroughbred horse racetrack is located and established, exclusive of Sundays, upon dates allocated by the Florida Pari-mutuel Commission. Such racing may be conducted either by day or night

or part by day and part by night. Provided, further that in all such counties the winter season for all pari-mutuel operations shall be during the period extending from and including October 1 in each year to and including April 15 of the following year and the summer season for all pari-mutuel operations in all such counties where horseracing in harness is conducted pursuant to s.550.068 shall be during the period extending from and including April 16 in each year to and including September 30 of the same year.

(2) The permitholder conducting a horserace meet under the provisions of this section shall pay the daily license fee, the admission tax, the tax on breaks, and the tax on pari-mutuel handle provided in s.550.09 and shall be subject to all penalties and sanctions provided in s.550.09(6).

Histories.—ss. 1-3, ch. 65-383; s. 1, ch. 71-176; s. 20, ch. 79-4; ss. 15, 22, ch. 80-57.

550.41 Summer thoroughbred horse racing period; additional days for charitable and scholarship purposes.— When there are three or more thoroughbred horse racetracks operating under valid outstanding permits issued by the Division of Pari-mutuel Wagering located withing a radius of 100 miles of each other, the division may issue a new permit for summer thoroughbred horseracing only. Such new permitholder within the area shall be permitted, during the period beginning on May 6 and ending on or before November 12 of each year, to conduct an additional 120 days of thoroughbred horseracing between the hours of 12 noon and 12 midnight eastern standard time or daylight saving time, exclusive of Sundays, upon dates allocated to it by the Florida Pari-mutuel Commission, which additional period of racing shall be known

as the "summer thoroughbred horse racing period." The horseracing season beginning December 1 of each year and ending May 5, referred to in s. 550.04, shall hereafter be known as the annual "winter thoroughbred horse racing season."

(2) The "annual period" of operation for thoroughbred horse racetracks as used and referred to in s. 550.081 shall refer to the annual winter racing period of such horse racetracks, and the additional days of summer thoroughbred racing as authorized herein shall be in additon and supplemental thereto. In determining the tax revenue produced by a horse racetrack during its preceding year of operation as provided for and required by s. 550.081(3), there shall be excluded therefrom the tax revenues produced by a track as the result of its having conducted a horserace meet during the summer thoroughbred racing period.

(3) The limitation of days of horseracing in any one county as set forth in s. 550.08 and the provisions of ss. 550.04 and 550.29, and the provisions of s. 550.081 prohibiting the Division of Pari-mutuel Wagering from granting new permits shall not apply to the summer thoroughbred racing season or period. No racing shall be permitted on Sunday; and no minors, except jockey apprentices, exercise boys, and grooms, shall be permitted to attend such races or to be employed in any manner by a track.

History.—s. 2, ch. 69-14; ss. 1, 2, ch. 71-98; s. 1, ch. 72-200; s. 70, ch. 72-221; s. 1, ch. 74-268; s. 2, ch. 75-241; s. 21, ch. 79-4; s. 11, ch. 82-149; s. 7, ch. 83-56.

550.43 Annual license; summer thoroughbred racing period.— On or before January 4 of each year, beginning January 4, 1970, the thoroughbred horse racetrack

desiring to conduct summer thoroughbred racing may file in writing, with the Department of Business Regulation, its application for permission to conduct a throughbred horse race meeting for a period not to exceed 120 days, exclusive of Sundays, during the summer thoroughbred racing season commencing on or after May 6, 1970, and in each of the following year. On or before March 1 of each year, the Division of Pari-mutuel Wagering shall issue a license authorizing the permitholder to conduct a racing meet during the summer thoroughbred racing season, during the period and for the number of days set forth therein. As a condition percedent to the granting of race dates, the summer thoroughbred permitholder shall agree to operate the full number of regular days authorized. In addition to the 120 authorized days of racing permitted by s. 550.41(1), the Florida Pari-mutuel Commission may authorize, after a public hearing, the summer thoroughbred permitholder to operate an additional 7 racing days during the summer thorougbred racing season. This requirement shall be based upon a finding that the operation of the additional racing days shall be in the best interest of the permitholder, the horsemen, and the state. The summer thoroughbred permitholder may apply for any additional racing days which may be available during the summer thoroughbred racing season and may operate those days upon approval of the Florida Pari-mutuel Commission.

History.—s.2,ch. 69-14; ss. 1, 2, ch. 71-98; s. 22, ch. 79-4; s. 17, ch. 80-57.

550.45 Allocation or reallocation of racing days.—The Florida Pari-mutuel Commission shall have the right to allocate or assign to another track or other tracks authorized to conduct summer thoroughbred horse racing, upon application therefor, any days or dates during the

summer thoroughbred racing season which have not been applied for; provided the aggregate total number of summer thoroughbred horse racing days shall not exceed 120 days, exclusive of Sundays, and exclusive of charity days and scholarship days as provided for in s. 550.41(4), (5) for any one horseracing licensee during the summer thoroughbred racing period; and provided further that such application must be filed on or before January 4 of each year, begininng January 4, 1970; and provided further, that the new permitholder for summer thoroughbred racing shall never conduct winter thoroughbred horseracing. The permitholder for winter thoroughbred horseracing in the areas described in s. 550.081 shall not conduct summer thoroughbred horse racing. However, the operator of any thoroughbred horse racetrack, including a new track constructed to conduct summer thoroughbred racing, is hereby authorized to lease such track to any other permitholder holding a permit for summer thoroughbred horse racing or winter thoroughbred horse racing in the area where three or more horse racetracks in this state are located in a radius of 100 air miles of each other. The commission shall have the right to reallocate or reassign to any other track or other tracks authorized to conduct summer thoroughbred horseracing any racing dates previously allocated or assigned to a licensed thoroughbred horse racing track when said summer racing dates have been abandoned or surrendered or will not be used for any reason whatsoever; provided the aggregate total number of summer thoroughbred horse racing days permitted hereunder shall not exceed 120 days, exclusive of Sundays, and exclusive of charity days and scholarship days as provided for in s. 550.41(4), (5), for any one horseracing licensee. The failure of any thoroughbred horse racetrack to apply for dates to conduct a summer thoroughbred racing meet in

any one or more years shall not preclude such track from making such application in any subsequent year.

History.—s.2, ch. 69-14; s. 1, ch. 71-98; s. 23, ch. 79-4

Office-Supreme Court, U.S.
FILED
JUL 18 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-1941

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

CALDER RACE COURSE, INC., TROPICAL PARK, INC., GULFSTREAM PARK RACING ASSOCIATION, INC., HIALEAH, INC., TAMPA BAY DOWNS, INC., AND TOURIST ATTRACTIONS, INC.,

Appellants,

VS.

DIVISION OF PARI-MUTUEL WAGERING, DEPARTMENT OF BUSINESS REGULATION, A STATE AGENCY, AND ROBERT ROSENBERG, DIRECTOR OF THE DIVISION OF PARI-MUTUEL WAGERING, AND RICHARD BURROUGHS, SECRETARY OF THE DEPARTMENT OF BUSINESS REGULATION,

Appellees.

MOTION TO DISMISS OR AFFIRM

JIM SMITH
ATTORNEY GENERAL OF FLORIDA

LOUIS F. HUBENER
ASSISTANT ATTORNEY GENERAL
COUNSEL OF RECORD

MITCHELL D. FRANKS
CHIEF TRIAL COUNSEL

THE CAPITOL
TALLAHASSEE, FLORIDA, 32301
(904) 488-1573

BEST AVAILABLE COPY

Table of Contents

	Page
Table of Contents	i
Table of Citations	ii
Introduction	1
Statement of the Facts and the Case	3
Argument	6
I. THE APPEAL SHOULD BE DISMISSED OR, IN THE ALTERNATIVE, THE DECISION BELOW AFFIRMED BECAUSE FLORIDA'S SUNDAY RACING AND GAMBLING PROSCRIPTIONS ARE A PROPER EXERCISE OF THE POLICE POWER AND THIS APPEAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.	6
Conclusion	13
Certificate of Service	15
Appendix	

Table of Citations

Cases	Page(s)
Clements v. Flashing, 457 U.S. 957 (1982)	11
Division of Pari-Mutuel Wagering, Department of Business Regulation, et al. v. Florida Horse Council, Inc. et al., 464 So.2d 128 (Fla. 1985)	8
Golden State Transit v. City of Los Angeles, 686 F.2d 758 (9th Cir. 1982), cert. denied, 103 S.Ct. 729 (1983)	4
Hialeah Race Course, Inc. v. Gulf Stream Park Racing Ass'n, Inc., 37 So.2d 692 (Fla. 1952)	12
Hodel v. Indiana, 452 U.S. 314 (1981)	4
Malmed v. Thornburgh, 621 F.2d 565 (3d Cir. 1980), cert. denied, 449 U.S. 955 (1980)	9
McGowan v. Maryland, 366 U.S. 420 (1961)	10, 11
Medina v. Rudman, 545 F.2d 244 (1st Cir. 1976)	12

Table of Citations (Cont'd.)

Rodriquez v. Jones,
64 So.2d 278
(Fla. 1953) 12

Schultz v. State,
361 So.2d 416 (Fla. 1978) 12

Florida Statutes

Chapter 550,
Florida Statutes 1

Chapter 551,
Florida Statutes 1

Other

Beating the Odds:
Compulsive Gambling as
an Insanity Defense,
14 Conn.L.Rev. 341 (1982) 7

Legalization and Control
of Casino Gambling,
8 Fordham Urban L.J. 245
(1979-1980) 7

Symposium, 12 Conn.L.Rev.
661 (1980) 7

MOTION TO DISMISS OR AFFIRM

Introduction

The appellants, holders of racetrack operating permits under Florida law, conduct horseracing contests at various tracks in Florida. These events all involve pari-mutuel gambling. Chapter 550, Florida Statutes, various sections of which are contained in the appendix to appellants' brief, prohibits the holding on Sunday of all horseracing and dogracing events involving pari-mutuel gambling. Chapter 551, Florida Statutes, regulating the sport known as jai alai, which is also associated with pari-mutuel gambling, prohibits such activity on Sunday. The net effect of Florida law is to prohibit all pari-mutuel gambling on Sunday. No other form of gambling is allowed under Florida law.

The appellants contend that the Sunday racing and gambling prohibition violates

the Fourteenth Amendment in that it is not a proper exercise of the state's inherent police power and in that it discriminates against the horseracing industry.

The appellants greatly overstate their case. The Florida Supreme Court, in this and in many preceding cases, has recognized the necessity for stricter control and regulation of gambling and racing because of the problems these activities engender. Evidence in the record supports the conclusion that such activities breed problems that ordinary commercial businesses do not. Moreover, all pari-mutuel gambling activities are treated alike under Florida law -- none are allowed to operate on Sunday. There is no evidence in this record -- nor any case law cited by the appellants -- that compels the conclusion that gambling and racing activities cannot be regulated more

strictly under the state's police power than ordinary commercial enterprises.

Accordingly, the appellees move that the Court dismiss this appeal or, in the alternative, affirm the judgment below on the grounds that: 1) the statutory proscription on Sunday racing and gambling is clearly a proper exercise of the state's inherent police power; and 2) the issues raised by the appellants do not present a substantial federal question.

Statement of the Facts and the Case

Appellants suggest at page 7 of their Jurisdictional Statement that there is no evidence in the record to substantiate the conclusion of the Florida Supreme Court that the statutes in question serve legitimate state purposes. This contention ignores the principle that a party attacking the constitutionality of a statute bears the heavy burden of proving the law's

unconstitutionality. Hodel v. Indiana, 452 U.S. 314 (1981). Where review of a state statute is sought on equal protection grounds, plaintiff's burden is to convince the court that there is no set of facts that may reasonably be conceived to justify the classification. Golden State Transit v. City of Los Angeles, 686 F.2d 758 (9th Cir. 1982), cert. denied, 103 S.Ct. 729 (1983). Although appellants may disagree with the reasoning and the conclusions of the Florida Supreme Court, at no time have they adduced facts which would arguably support, much less compel, another result.

Appellants' representation that there are no record facts supporting the decision of the Florida Supreme Court is unwarranted. A defendant and witness in this case, the Florida Secretary of Business Regulation, testified by deposition that pari-mutuel sporting events have been plagued by instances of game fixing, greyhound race

fixing, horse race fixing, bookmaking, and illegal sales of drugs and alcoholic beverages at tracks. (Appendix, infra, pages 5,6) Moreover, both the Secretary and the former director of the Division of Pari-Mutuel Wagering, testified that the horseracing industry required at least one day of rest per week for its own benefit. (Appendix, infra, pages 3,8)

This case was decided at the trial level by a summary judgment. The evidence consisted only of the depositions given by the Secretary and the division director. There were no conflicts in the testimony of these two witnesses; indeed, as the only witnesses, their testimony stands unrebutted.

Argument

I. THE APPEAL SHOULD BE DISMISSED OR, IN THE ALTERNATIVE, THE DECISION BELOW AFFIRMED BECAUSE FLORIDA'S SUNDAY RACING AND GAMBLING PROSCRIPTIONS ARE A PROPER EXERCISE OF THE POLICE POWER AND THIS APPEAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

Appellants' argument can be distilled into two contentions. First, appellants disagree with the Florida Supreme Court's conclusion that the Sunday racing and gambling ban serves legitimate state purposes, arguing that the court's conclusions are not supported by evidence. Second, they contend, as a matter of law, that pari-mutuel gambling activity cannot be treated differently than ordinary businesses which may operate on Sunday under Florida law. The first argument presents no federal question at all; indeed, it merely seeks to improperly shift the burden of proof from the racing and gambling interests to the state. The

second contention is wholly without supporting authority.

As to the asserted evidentiary deficiency, the record is clear that racing and gambling engender certain undesirable and unlawful collateral activities. (A 1-6) Moreover, gambling itself is a recognized social problem whose dimensions may extend from the affliction of "compulsive gambling" to the intrusion of organized crime.[1] There is no evidence to the contrary in the record of this case. Thus, the conclusions reached by the Florida Supreme Court are amply justified:

> In the instant case, it would seem that the legislature could reasonably find that the Sunday racing and betting restrictions serve several legitimate state purposes

---

[1] See, e.g., Beating the Odds: Compulsive Gambling as an Insanity Defense, 14 Conn.L.Rev. 341 (1982); Symposium, 12 Conn.L.Rev. 661, 676-679 (1980); Legalization and Control of Casino Gambling, 8 Fordham Urban L.J. 245 (1979-1980).

> which promote the public health, safety, morals, and general welfare of the citizens of the state of Florida. The restrictions serve these legitimate purposes: 1) they encourage people to spend their weekend leisure time at non-gambling, presumably more healthy recreational pursuits and other activities; 2) closing such facilities on what might otherwise be the busiest day of the week could help curb the compulsive gambler syndrome; and 3) racing on less busy days means there is less opportunity for mischief that sometimes attends these events, and therefore a lighter burden on law enforcement authorities is created. Thus, we find that the statutes in question do serve legitimate state purposes.

Division of Pari-Mutuel Wagering, Department of Business Regulation, et al. v. Florida Horse Council, Inc. et al., 464 So.2d 128, 130 (Fla. 1985).

In reviewing the statutory proscription, the applicable standard is not, as appellants argue, whether the legislature's purpose or the court's conclusions were proved by evidence -- although the evidence here was certainly ample. Where necessary, a "court may hypothesize the motivations of

the state legislature to find a legitimate objective. . . ." Malmed v. Thornburgh, 621 F.2d 565 (3d Cir. 1980), cert. denied 449 U.S. 955 (1980). Thus, the above findings are eminently proper, and the court might well have added to them the observation that the legislature could have found that allowing gambling activities on both days of the weekend was contrary to the public welfare and unhealthy in itself. Or the court might have additionally concluded, in view of the undisputed evidence, that in the judgment of the legislature it is more beneficial to the industry to take its needed day of rest on Sunday. The racing industry rebutted neither these nor the other conclusions with a scintilla of evidence.

Here, in reviewing the statutes in question and, in particular, their "classification" of racing and gambling activities, the Florida Supreme Court

relied on the reasoning of the Supreme Court in McGowan v. Maryland, 366 U.S. 420 (1961). In McGowan, this Court approved the constitutionality of a Maryland Sunday closing law that contained numerous exceptions. The Florida court quoted the following portion of McGowan:

> [T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

366 U.S. at 425 (citations and footnote omitted). Certainly if Florida's objective is to discourage gambling on both days of the weekend and to lighten law enforcement burdens, a Sunday ban would be effective. By no means can it be said that the ban is

"wholly irrelevant to the achievement of the State's objective." McGowan, supra, at 425.

The above portion of the McGowan opinion compels the conclusion that the racing industry, and more broadly the pari-mutuel gambling interests, can be classified together and treated differently from more traditional, non-gambling businesses. Appellants cite no case, state or federal, holding that gambling activities cannot be classified or regulated more strictly than other businesses. They advance no fact or argument which would even tend to show that classification of pari-mutuel gambling activities is invidious, arbitrary or irrational. See, Clements v. Flashing, 457 U.S. 957 (1982).

Appellants' discussion of past litigation over various Florida laws or local ordinances requiring Sunday closing misses the mark for precisely the reason that

those cases dealt with discrimination among businesses of essentially similar character. Appellants do not refer the Court to the numerous Florida cases holding that gambling is "inherently dangerous to society" and may be suppressed altogether under the police power. Schultz v. State, 361 So.2d 416 (Fla. 1978); Rodriquez v. Jones, 64 So.2d 278 (Fla. 1953); Hialeah Race Course, Inc. v. Gulf Stream Park Racing Ass'n, Inc., 37 So.2d 692 (Fla. 1952). Federal courts too have recognized that gambling is "traditionally suspect in our society" and "plainly open to the strictest kind of supervision." Medina v. Rudman, 545 F.2d 244, 251 (1st Cir. 1976).

Appellants blandly suggest that "Florida has a public policy of allowing businesses, no matter what the nature or purpose of the business, to operate . . . and open its [sic] doors to the public whenever it [sic] elects. . . ." (Brief at

11) This is wholly unsupported by the record or by Florida case law. The inherently suspect nature of gambling cannot be effaced by inappropriate and simplistic analogies to categorically different business activities.

Conclusion

Appellants' arguments raise no substantial federal question. A state unquestionably has the right to suppress gambling altogether or to subject it to the strictest regulation where it is allowed. The time and frequency of gambling operations are of obvious concern to a state. No basis in law or reason has been shown for restricting a state's regulatory authority over gambling and limiting it to what it may exert over common occupations.

For the foregoing reasons, the appeal should be dismissed or the decision of the Florida Supreme Court affirmed.

Respectfully submitted,

JIM SMITH
Attorney General

MITCHELL D. FRANKS
Chief Trial Counsel

LOUIS F. HUBENER
Assistant Attorney General

Department of Legal Affairs
The Capitol - Suite 1501
Tallahassee, Florida 32301
(904) 488-1573

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Motion to Dismiss or Affirm has been deposited in the United States mail, first class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court and to Wilbur E. Brewton and James Riley Davis, Taylor, Brior, Buker and Greene, 225 S. Adams, Suite 250, Tallahassee, Florida 32301, this 16th day of July, 1985. I FURTHER CERTIFY that the foregoing Motion to Dismiss or Affirm was served within thirty (30) days of the receipt of the appellants' jurisdictional statement as required by Supreme Court Rule 16.1.

Louis F. Hubener

Louis F. Hubener

SWORN TO and SUBSCRIBED before me, this 16th day of July, 1985.

Lucie C Barrett

Notary Public

Notary Public, State of Florida
My Commission Expires June 26, 1988
Bonded Thru Troy Fain - Insurance, Inc.

APPENDIX A

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

FLORIDA HORSE COUNCIL, INC., et al.,	:	
Plaintiffs,	:	
vs.	:	CASE NO. 83-43878
	:	Div. 9
DIVISION OF PARI-MUTUEL WAGERING, et al.,	:	
Defendants.	:	
	:	

THE DEPOSITION OF: GARY RUTLEDGE

TAKEN AT THE INSTANCE OF:	The Plaintiffs
DATE:	Friday, June 15, 1984
TIME:	Commenced at 11:15 a.m. Concluded at 11:45 a.m.
PLACE:	725 South Bronough Street Tallahassee, Florida
REPORTED BY:	MARY ALLEN NEEL Shorthand Reporter Notary Public in and for the State of Florida at Large

* * *

CROSS EXAMINATION

BY MR. HUBENER:

Q If the Sunday prohibition on racing were removed, say, held invalid or otherwise removed, would that mean that horse racing would be permitted on a seven day a week basis?

A My understanding is that because of the limitation on the number of days that permit holders can run, that they would not -- it might be conceivable that they could operate seven days of the week, but it would not seem very practical, because there would still be the same number of total days that they could run.

So, if they ran seven days of the week, arguably, they would then be closed other whole weeks and forego logically profitable days of operation. So, while they legally could maybe operate for seven days of the week during certain periods of

time, they would use up their days. And it would not make economic sense to the permit holders of the state for that to happen.

A Well, in your opinion, would the effects, economic or otherwise, be positive if the tracks were to remain open and run seven days a week?

A I don't think that it would be a good thing for the tracks to operate seven days a week. I think it would be preferable for them to operate six days a week, or maybe occasionally, as in the case of the summer, to operate maybe as few as five days a week.

Q So you think it would be desirable that there be at least one closing day a week, whether --

A I think that's desirable.

Q -- by law or otherwise?

A I think that's desirable, yes.

* * *

Q In your previous position as Division Director and in your current position as Department Secretary, do you receive reports of such things as criminal activities or arrests that go on at the race tracks?

A We would receive, yes, some of that information, certainly.

Q Could you generally describe the information you receive?

A Well, there would be different mechanisms for us to become aware of it. All tracks, as far as I know, have a policy where they might choose to exclude someone. And included in the reasons they might choose to exclude someone would be because of either their criminal history or a criminal or other act that took place at the facility. And we would receive notification of those exclusions in the little reports that are filled out on them.

If there is criminal activity particularly related to the actual sport, we would generally be involved with either the law enforcement agency involved or the track management, or other persons in terms of monitoring that. We have had occasions where that situation presented itself.

And then the greatest number would be knowing on the front end, because we fingerprint all licensees and get those criminal histories and see whether or not they're qualified to be licensed. So we would have access to that information, which may or may not on occasion involve a history of some criminal act that took place at a facility.

Q What specific kinds of criminal activities have been reported?

A Well, that would be, with the number of facilities and the number of people involved, a real large range. I guess

related to the industry, there have been criminal acts relating to game fixing, greyhound race fixing or horse race fixing, that type of activity. That's probably the most serious area. Of course, occasionally there's bookmaking activity or something down the range, including maybe the sale of alcohol to a minor.

Q What about the sale of drugs at tracks? Has that been reported?

A Yes. We've had that activity reported and action taken, yes.

There's a lot more, a lot many other types of activity that would report -- that would happen, because of the fact that you've really got a living environment, particularly at horse tracks. So, you've got the same types of activity that could take place there that could take place in any community.

* * *

APPENDIX B

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

FLORIDA HORSE COUNCIL, INC., et al.,	:	
Plaintiffs,	:	
vs.	:	CASE NO. 83-43878
	:	Div. 9
DIVISION OF PARI-MUTUEL WAGERING, et al.,	:	
Defendants.	:	
	:	

THE DEPOSITION OF: ROBERT M. SMITH

TAKEN AT THE INSTANCE OF:	The Plaintiffs
DATE:	Friday, June 15, 1984
TIME:	Commenced at 11:45 a.m. Concluded at 12:10 p.m.
PLACE:	725 South Bronough Street Tallahassee, Florida
REPORTED BY:	MARY ALLEN NEEL Shorthand Reporter Notary Public in and for the State of Florida at Large

* * *

* * *

Q If racing should be permitted on Sunday, and if the number of allotted racing days remains as it is now, would you conclude that permit holders, I suppose, or tracks would have one day set aside when they would not race?

A Yes, sir, I would conclude that. At least one.

Q So instead of the State setting aside a day of rest, you think that would be done anyway by the tracks or the permit holders?

A I'm not saying that the Department of Business Regulation wouldn't choose to be involved in that from a regulatory point of view. But experience clearly dictates that the industry would close at least one day a week. At the present moment, I believe they're operating only five days a week.

* * *